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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/859,716	05/17/2001	Raymond S. Wach	EMPIR-022AUS	4114

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DALY, CROWLEY, MOFFORD & DURKEE, LLP  
SUITE 101  
275 TURNPIKE STREET  
CANTON, MA 02021-2310

EXAMINER

TAYLOR, NICHOLAS R

ART UNIT	PAPER NUMBER
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2141

DATE MAILED: 04/21/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

**Application No.**

09/859,716

**Applicant(s)**

WACH, RAYMOND S.

**Examiner**

Nicholas R Taylor

**Art Unit**

2141

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 12 January 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-36 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-36 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 17 May 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

1. Claims 1-36 have been presented for examination and are rejected.

### ***Response to Arguments***

2. Applicant's arguments with respect to claims 1-36 have been considered but are moot in view of the new ground(s) of rejection.

### ***Claim Rejections - 35 USC § 103***

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 1-5, 8, 19-23, 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Scarlat et al. (US Patent 6,477,483) and Sharon et al. (US Patent 6,137,782.)

5. As per claims 1 and 19, Scarlat teaches a method of performing distributed testing of a target comprising the steps of (Scarlat, column 2, lines 33-36):

identifying at least one system which meets a predetermined criteria (Scarlat, column 4, lines 14-19);

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scheduling said at least one system to provide load to said target (Scarlat, column 4, lines 14-19);

deploying said at least one system at the scheduled time, said at least one system providing load to said target (Scarlat, column 6, lines 6-22.)

However, Scarlat fails to teach wherein the predetermined criteria include a physical location of said system. Sharon teaches a method of testing and analyzing network traffic based on physical system location (Sharon, column 4, line 64 to column 5, line 33.) It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to have combined Scarlat and Sharon to provide the physical location-based analysis of Sharon in the system of Scarlat, because doing so would enable traffic flow analysis through a network according to physical topology (Sharon, column 2, lines 59-64.)

6. As per claims 2 and 20, Scarlat-Sharon teaches the system further wherein said target comprises a web site (Scarlat, column 3, lines 28-37.)

7. As per claims 3 and 21, Scarlat-Sharon teaches the system further wherein said target comprises a software component (Scarlat, column 3, lines 28-37.)

8. As per claims 4 and 22, Scarlat-Sharon teaches the system wherein said ~~predetermined criteria further include additional criteria selected from the group~~

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comprising: sizes of said systems, speeds of said systems, and availability of said systems (Sharon, column 11, lines 16-28.)

9. As per claims 5 and 23, Scarlet-Sharon teaches the system further wherein said at least one system provides load across a network to said target (Scarlat, column 2, lines 33-36.)

10. As per claims 8 and 26, Scarlet-Sharon teaches the system wherein said network comprises the Internet (Scarlat, column 2, lines 33-36.)

11. Claims 6, 9, 10, 24, 27, and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Scarlet et al. (US Patent 6,477,483) and Sharon et al. (US Patent 6,137,782), further in view of Siefert (US Patent 5,721,906.)

12. As per claims 6 and 24, Scarlet-Sharon teaches the above, yet fails to teach the step of defining a catalog of potential systems which meet said predetermined criteria and wherein said step of identifying at least one system is performed from said catalog of potential systems.

Siefert teaches the step of defining a catalog of potential systems which meet said predetermined criteria wherein a system is determined from the catalog (Siefert, column 4 line 15 to column 5 line 8.) It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to have combined Scarlet-Sharon and

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Siefert to provide the catalog of Siefert in the system of Scarlet-Sharon, because doing so would organize the system data making selection more efficient.

13. As per claims 9 and 27, Scarlet-Sharon-Siefert teaches the system further wherein said catalog is dynamic (Siefert, column 9, lines 9-35, wherein adding a resource utilizes a dynamic source.)

14. As per claims 10 and 28, Scarlet-Sharon-Siefert teaches the system further wherein said catalog is static (Siefert, column 9, lines 9-35, wherein locating a resource without making modifications utilizes a static source.)

15. Claims 7 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Scarlet et al. (US Patent 6,477,483) and Sharon et al. (US Patent 6,137,782), further in view of Mercury (White Paper "Load Testing to Predict Web Performance.")

16. As per claims 7 and 25, Scarlet-Sharon teaches the above, yet fails to teach the method wherein said software component is selected from the group consisting of EJB, Corba, COM, DCOM and COM+.

Mercury teaches the method wherein said software component is selected from the group consisting of EJB, Corba, COM, DCOM and COM+ (Mercury, page 10-11, "Mercury LoadRunner" section.) It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to have combined Scarlet-Sharon and

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Mercury to provide the software component selection of Mercury in the system of Scarlet-Sharon, because doing so would enable testing a larger variety of test targets.

17. Claims 11-14, 16, 29-32, and 34-36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mercury (White Paper "Load Testing to Predict Web Performance") and Sharon et al. (US Patent 6,137,782.)

18. As per claims 11 and 29, Mercury teaches a method of performing distributed monitoring of a target comprising the steps of:

identifying at least one system which meets a predetermined criteria;

scheduling said at least one system to monitor said target; and

deploying said at least one system at the scheduled time, said system providing monitor functions to said target (Mercury, page 14, Step 6 section.)

However, Mercury fails to teach wherein the predetermined criteria include a physical location of said system. Sharon teaches a method of testing and analyzing network traffic based on physical system location (Sharon, column 4, line 64 to column 5, line 33.) It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to have combined Mercury and Sharon to provide the physical location-based analysis of Sharon in the system of Mercury, because doing so would enable traffic flow analysis through a network according to physical topology (Sharon, column 2, lines 59-64.)

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19. As per claims 12 and 30, Mercury-Sharon teaches the system further wherein said target comprises a web site (Mercury, page 14, Step 6 section, specifically the use in web servers.)

20. As per claim 13 and 32, Mercury-Sharon teaches the system wherein said predetermined criteria further include additional criteria selected from the group comprising: sizes of said at least one system, speeds of said at least one system, and availability of said at least one system (Sharon, column 11, lines 16-28.)

21. As per claim 14, Mercury-Sharon teaches the system wherein said at least one system provides monitor functions across a network to said target (Mercury, page 14, Step 6 section.)

22. As per claim 16, Mercury-Sharon teaches the system further wherein said network comprises the Internet (Mercury, page 14, Step 6 section, specifically the use in web servers.)

23. As per claim 31, Mercury-Sharon teaches the system wherein said target comprises a software component (Mercury, page 10-11, "Mercury LoadRunner" section.)



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24. As per claim 34, Mercury-Sharon teaches the system further wherein said software component is selected from the group consisting of EJB, CORBA, COM, DCOM, and COM+ (Mercury, page 10-11, "Mercury LoadRunner" section.)

25. As per claim 35, Mercury-Sharon teaches the system further wherein said systems provide load across a network to said target (Mercury, page 14, Step 6 section, wherein running a test involves sending a load across a network.)

26. As per claim 36, Mercury-Sharon teaches the system further wherein said network comprises the Internet (Mercury, page 14, Step 6 section, specifically the use in web servers.)

27. Claims 15, 17, 18, and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mercury (White Paper "Load Testing to Predict Web Performance") and Sharon et al. (US Patent 6,137,782), further in view of Siefert (US Patent 5,721,906.)

28. As per claims 15 and 33, Mercury-Sharon teaches the above, yet fails to teach the step of defining a catalog of potential systems which meet said predetermined criteria and wherein said step of identifying at least one system is performed from said catalog of potential systems.

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Siefert teaches the step of defining a catalog of potential systems which meet said predetermined criteria wherein a system is determined from the catalog (Siefert, column 4 line 15 to column 5 line 8.) It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to have combined Mercury-Sharon and Siefert to provide the catalog of Siefert in the system of Mercury-Sharon, because doing so would organize the system data making selection more efficient.

29. As per claim 17, Mercury-Sharon-Siefert teaches the system further wherein said catalog is dynamic (Siefert, column 9, lines 9-35, wherein adding a resource utilizes a dynamic source.)

30. As per claim 18, Mercury-Sharon-Siefert teaches the system further wherein said catalog is static (Siefert, column 9, lines 9-35, wherein locating a resource without making modifications utilizes a static source.)

### ***Conclusion***

31. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nicholas Taylor whose telephone number is (571) 272-3889. The examiner can normally be reached on Monday-Friday, 8:00am to 5:30pm, with alternating Fridays off.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rupal Dharia can be reached on (571) 272-3880. The fax phone number for the organization where this application or proceeding is assigned is (703) 305-3718.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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